STATE BUY-AMERICAN STATUTES: THEIR RELATION TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE FEDERAL CONSTITUTION

The rising concern in the United States over the effect of low priced foreign goods entering the domestic market has caused new waves of protectionist feelings to sweep across the nation[1] and has aroused new interest in certain non-tariff controls.[2] One of these controls is the use of government procurement policies which discriminate against foreign goods. Often called "buy-American" or "buy-local" statutes, these regulations force procurement officials and bidders on government contracts to give preference to American made goods, a practice often resulting in increased cost to the public.[3]

The model for many of the state buy-American statutes was the federal act[4] passed in 1933 as an anti-depression measure. The original purpose of the statute was to combat rampant unemployment,[5] to assure that domestic and not German manufacturers won the valuable contract for the construction of heavy electrical equipment for the Hoover dam,[6] and to retaliate for the "buy-British" movement in England.[7] The statute covers the purchase of articles and supplies by, and the construction of public buildings or works for, the federal government. Although there have been attempts to repeal the act,[8] and legal writings urging such repeal,[9] protectionist factors in Congress have been successful in thwarting such efforts.

The state and local buy-American policies, more vulnerable to legal attacks than the federal act, are of more immediate interest. These policies are embodied in various forms ranging from state and local statutes[10] to administrative regulations and informal policies.[11] They consist of every-

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[1] *See* N.Y. Times, January 17, 1971, Sec. IV, at 14 ,col. 5.

[2] *See* Matthews, *Non-Tariff Import Restrictions: Remedies Available in United States Law*, 62 MICH. L. REV. 1295 (1963), for a complete discussion of non-tariff import restrictions.

[3] *See, e.g.*, HAWAII REV. STAT. § 103-24 (1968) "In all expenditures of public money for any public work or in the purchase of materials or supplies, preference shall be given to American products, materials and supplies." Also see N.J. STAT. ANN. § 52:33-2 (Supp. 1962); 61 OKLA. STAT. ANN. § 51 (1963); 71 PA. STAT. ANN. § 639 (Purdons 1962).

[4] U.S.C. §§ 10(a)-10(d) (1965).

[5] 76 CONG. REC. 2985, 3254 (1933).

[6] 76 CONG. REC. 3175, 3178, 3253 (1933).

[7] 76 CONG. REC. 3175 (1933). For a detailed discussion of the legislative history of the federal buy-American act see Gantt and Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. PUB. L. 378 (1958).

[8] COMMISSION ON FOREIGN ECONOMIC POLICY, REPORT TO THE PRESIDENT AND CONGRESS, 83d Cong., 2d Sess. (1954), also found in H.R. Doc. No. 220, 83d Cong., 2d Sess. (1954).

[9] Knapp, *The Buy American Act: A Review and Assessment*, 61 COLUM. L. REV. 430 (1961).

[10] *See* note 3 *supra.*

[11] For an example of an administrative buy-American regulation, *see* Minute Order No.

thing from complete prohibition of the use of foreign goods and discriminatory licensing, labeling and inspection regulations to policies favoring American goods if all other factors are equal.[12] A 1963 survey revealed that about one-third of the responding states restricted their purchase of foreign goods by either statute or policy.[13]

Recently, state and local buy-American policies have come under attack by foreign interests, especially in the steel industry.[14] Generally these attacks are based on two arguments: (1) that state and local buy-American statutes violate Article III of the General Agreement on Tariffs and Trade (GATT)[15] and (2) that they constitute an intrusion into the foreign affairs and the commerce powers reserved by the Constitution to the federal government. It is the purpose of this note to examine the substance of these arguments.

I. STATE "BUY-AMERICAN" STATUTES AND GATT

A. *The Problem*

The state buy-American statutes appear to be in conflict with at least one provision of the GATT, that being Article III, Paragraph 4 of Part II:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws regulations requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use . . . .[16]

The supporters of the buy-American statutes argue that GATT is not intended to be applicable to the states at all, but only to the federal government. In support of this position they point to Article XXIV, Paragraph 12, of Part II:

> Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local government and authorities within its territory.[17]

48,644 by the Texas Highway Commission which was the subject of *Texas Highway Com'n v. Texas Ass'n of Steel Imp., Inc.*, 372 S.W. 525 (Tex. 1963).

[12] For an example of discriminatory licensing *see* City of Columbus v. McGuire, 25 Ohio Op. 2d 331, 195 N.E.2d 916 (Franklin County Mun. Ct. 1963); *and* City of Columbus v. Miqadasi, 25 Ohio Op. 2d 337, 195 N.E.2d 923 (Franklin County Mun. Ct. 1963).

[13] National Association of State Purchasing Officials Committee on Competition in Government Purchasing, 1963 Survey on In-State Preference Practices, Domestic vs. Foreign Purchases (available from NASPO, 1313 East 60th St., Chicago, Illinois 60637, portions reproduced in Note, 32 GEO. WASH. L. REV. 584, 608 (1964)).

[14] *See* Bethlehem Steel Corp. v. Bd. of Commissioners, 275 Cal. App.2d 221, 80 Cal. Rptr. 800 (Ct. App. 1969); American Institute for Imported Steel v. County of Erie, 58 Misc. 2d 1059, 297 N.Y.S.2d 602 (Erie Co. 1968), *rev'd on other grounds*, 302 N.Y.S. 60 (1969).

[15] 61 Stat. pt. 5, T.I.A.S. No. 1700.

[16] *Id.* at A19.

[17] 61 Stat. pt. 5, A67-68, T.I.A.S. No. 1700 (1947).

They further argue that regardless of the applicability of GATT to the state statutes generally, the buy-American statutes, most of which were in effect before GATT became applicable, are not affected by the Agreement because of Section I of the Protocol of Provisional Applications,[18] the document which officially adopted GATT. Section I provides that GATT is to be applied "to the fullest extent not inconsistent with existing regulations."[19]

Finally, the proponents of the state buy-American statutes maintain that even if GATT is applicable to the state laws, the "escape clause" of Article III exempts them. Article III, Paragraph 8(a) of Part II states:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial resale.[20]

In order to determine the validity of these arguments four areas must be examined:

(1) The role of GATT in United States law.
(2) The meaning of the "existing legislation" clause.
(3) Whether GATT is the "supreme law of the land."
(4) The applicability of the "government purchase exception."

B. *GATT as United States Law*

During the negotiations relating to the formation of the International Trade Organization (ITO), a body which was to be formed under the auspices of the United Nations Economic and Social Council,[21] GATT came into being. The intent of the draftsmen was that GATT would be a temporary agreement, valid only until the ITO charter was properly framed and ratified by the member states. The United States received the draft ITO charter in April, 1949,[22] but Congress never voted on the matter. In December of 1950, the State Department announced that the charter would not be resubmitted to Congress.[23] Thus, while the ITO charter was never put into effect, the supposedly temporary GATT remains even today.

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[18] 61 Stat. pt. 6, A 2051, T.I.A.S. No. 1700 (1947).

[19] *Id.*

[20] *Supra,* note 17.

[21] *See Hearings on Trade Agreement System and Proposed International Trade Organization Charter before The Senate Committee of Finance,* 80th Cong., 1st Sess., p. 55 (1947); U.N. Conference on Trade and Employment, Preparatory Committee, *Report of the First Session,* U.N. Doc. E/PC/T/33 (1947) Annexure 10; U.N. Conference on Trade and Employment, Preparatory Committee, *Report of the Darfting Committee,* U.N. Doc. E/PC/T/34 Rev.1 (1947) pt. III.

[22] S. Doc. No. 61, H.R. Doc. No. 168, 81st Cong., 1st Sess. (1949).

[22] S. Doc. No. 61, H.R. Doc. No. 168, 81st Cong., 1st Sess. (1949).

[23] 23 DEP'T STATE BULL. 977 (1950).

The actual completion of the GATT negotiations took place in Geneva on October 30, 1947, and it was put into effect by the Protocol of Provisional Application,[24] an executive agreement entered into by the President. The authority of the President to enter this agreement has been said to be derived from one of two sources: either the delegation of Congressional authority through the Reciprocal Trade Act of 1934,[25] or the broad powers of the President in the area of foreign relations.[26] Attacks on the power of the Congress to delegate authority to the President under the Reciprocal Trade Act of 1934 have been unsuccessful in the past and are not likely to succeed in the future.[27] Attacks based on the premise that GATT oversteps the authority delegated to the President are more substantial, but as will be seen, are also likely to fail.

The Reciprocal Trade Agreements Act gives the President the power to "enter into foreign trade agreements" and "to proclaim such modifications of existing duties and other import restrictions . . . . as are required or appropriate to carry out any foreign trade agreement" provided "no proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between dutiable and free lists . . . ."[28] It has been said that the first clause gives the President unlimited power to enter into any agreement which might reasonably be termed a foreign trade agreement.[29] However, the area of "foreign trade agreements" so defined might encompass a variety of matters fairly far afield of the original subject. It is the argument of the supporters of the state buy-American statutes that GATT is such a matter.

Supporters of the state buy-American statutes further argue that the "unlimited" interpretation would have the effect of allowing the President to bind the United States internationally to any "foreign trade agreement" he may wish to enter without necessarily giving him the means to implement the policy domestically.[30] At least one writer has pointed out that

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[24] *See* note 18 *supra.*

[25] 48 Stat. 943 (1934), *as amended,* 19 U.S.C.A. § 1351 (1958). This authority has been continued over the years: 57 Stat. 125 (1943); 59 Stat. 410 (1945); 63 Stat. 698 (1949); 69 Stat. 162 (1955); 72 Stat. 673 (1958); 76 Stat. 872 (1962). For sources referring to this statute as authority for the president to enter GATT, *see* 94 CONG. REC. 12662 (1949).

[26] *See* H.R. Rep. No. 2007, 84th Cong., 2d Sess. (1955); *Hearings on Extension of the Trade Agreements Act Before The Senate Finance Comm.,* 82d Cong., 1st Sess. 1153 (1951); *Hearings on the Extension of Reciprocal Trade Agreements Act Before The Senate Finance Comm.,* 81st Cong., 1st Sess. 105 (1949); Statement by the Legal Advisor to the State Department, reprinted in *Hearings on Trade Agreement System and Proposed International Trade Organization Charter Before the Senate Committee of Finance,* 80th Cong., 1st Sess. 173-87 (1947).

[27] Star-Kist Foods, Inc. v. U.S., 275 F.2d 473 (1959). *See* Hampton & Co. v. U.S., 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892) upholding similar statutes. *See also,* Jackson, *GATT in U.S. Domestic Law,* 66 MICH. L. REV. 249, 257 (1967).

[28] 48 Stat. 943-44 (1934).

[29] Memorandum of the Department of State, *printed in* H.R. Rep. No. 2007, 84th Cong., 2d Sess. 113 (1956).

[30] Jackson, *GAAT in U.S. Domestic Law,* 66 MICH. L. REV. 249, 261 (1967).

for this reason it would be more efficacious to read the term "trade agreement" as being limited by the second clause.[31] Thus, a "trade agreement" would have to be related to "duties and import restrictions." This reading would result in the President's being able to enter only those agreements which he could carry out domestically through his limited powers of proclamation.[32]

Clearly, even with this narrow reading of the term "trade agreements," Article III, paragraph 4 qualifies because it relates to import restrictions. Further, the proclamation of the President necessary to give a foreign trade agreement the force of domestic law was made in respect to Article III, paragraph 4.[33] Thus if the President's power to enter GATT is based on the Reciprocal Trade Agreements Act, it is very likely valid.

Resting the presidential authority on the broad powers of the executive to regulate foreign affairs is more questionable. Although there are precedents for the use of executive agreements in the area of foreign commerce,[34] they are limited. One United States court of appeals held that an executive agreement with Canada relating to the importation of seed potatoes was invalid because the power to regulate foreign commerce is vested in the legislature and not the executive branch.[35]

While it is still possible to argue the invalidity of GATT, or portions of GATT, under United States law, the fact that GATT now forms the general framework for all foreign trade weighs heavily against the possibility of a court's striking down the entire agreement.

C. *The "Existing Legislation" Exception*

Assuming that GATT is a valid executive agreement, it is necessary to determine whether it supercedes state legislation. It is an accepted principle that self-executing agreements are superior to state legislation existing at the time of the making of the agreement.[36] GATT, however, is somewhat different. It is domestic law by virtue of its having been proclaimed by the President. In the announcement proclaiming GATT in force, President Truman used the words of the Protocol of Provisional Application[37] saying that the United States would apply provisionally after

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[31] *Id.*

[32] For a discussion of how a proclamation has the effect of domestic law, *see id.* at 282-290.

[33] Presidential Proclamation No. 2761A, 3 C.F.R. 139 (Supp. 1947).

[34] *See, Hearings on the Extension of the Reciprocal Trade Agreements Act Before The Senate Finance Comm.*, 81st Cong., 1st Sess. 103-54 (1949).

[35] United States v. Guy W. Capps, Inc. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1954). At page 658 the court states:

> The power to regulate foreign commerce is vested in Congress, not the executive or the courts; and the executive may not exercise the power by entering into executive agreements and suing in the courts . . . .

[36] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[37] 61 Stat., pt.6, A2051 (1947); 55 U.N.T.S. 308 (1950).

January 1, 1948 "(a) parts I and III of said general agreement and (b) part II thereof to the fullest extent not inconsistent with existing legislation."[38] If "existing legislation" includes state legislation then most state buy-American statutes are exempt from Article III, Paragraph 4 which falls under Part II of GATT.

Those who are opposed to the notion that the term "existing legislation" includes state legislation point to the legislative history of GATT as support for their position. The clause, originally in the text of GATT[39] and later moved to the Protocol,[40] was necessary in order that GATT could expeditiously be put into operation. This was so because a large number of delegations possessed only the power to agree on tariffs, the non-tariff portion of the agreement (Part II) requiring passage by their respective legislatures. Thus it would seem that the draftsmen of GATT only intended to exempt from coverage those matters over which executives did not have power and therefore to which the delegations could not agree. Since an executive agreement in the United States is superior to inconsistent state law, the argument goes, the executive could agree to Part II without any legislative action and therefore United States state laws should not fall under the category "existing legislation" for Part II purposes.

Further support for this position comes from the view held by the United States government. In 1951, the State Department officials taking part in the GATT negotiations prepared a memorandum of inconsistent existing legislation which would have to be repealed in which they did not mention any state laws.[41] Later, a similar list was presented to GATT and was likewise devoid of any state law.[42] These omissions could be interpreted to indicate that the United States government never considered state laws as falling under the category "existing legislation." On the other hand, the argument is sometimes made that state legislation was not included in the memorandum to Congress because Congress was only concerned with the federal laws it would have to repeal.[43] However, that does not serve to explain the later report to GATT. The argument is quite strong that "existing legislation" means only "existing federal legislation."

D. *The "Local Government" Clause*

This area of the law is further complicated by the existence of Article XXIV, Paragraph 12, of Part II:

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[38] *Supra* note 33.

[39] U.N. Doc. E/PC/T/135, at 9 (July 24, 1947).

[40] U.N. Doc. E/PC/T/196 (Sept. 13, 1947).

[41] *Hearings on Extension of the Trade Agreements Act Before The Senate Finance Comm.*, 82d Cong., 1st Sess. 1195 (1951).

[42] GATT Doc. L/2375/Add. 1 at 17 (1965), reproducing L/309/Add. 1 and 2 (1955).

[43] *See GATT, The California Buy American Act, and the Continuing Struggle Between Free Trade and Protectionism*, 52 CALIF. L. REV. 335, 341 (1964).

> Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this agreement by the regional and local governments and authorities within its territory.[44]

There are at least two interpretations of this Article leading to different results vis-à-vis GATT's superiority to state law. One interpretation is that the national governments were required only to take "reasonable measures" to try to *persuade* their political subdivisions to abide by GATT, even if the national government had the legal authority to *require* its subdivisions to comply. Thus, assuming these "reasonable measures," meaning persuasion, were taken, the national government could not be held internationally liable for breaches of GATT by its subdivisions. This interpretation leads to the conclusion that GATT was not meant to override inconsistent state legislation.

The position that "reasonable measures" means "persuasion" is supportable by several past constructions. In a letter from the State Department to the Attorney General of Hawaii in 1957, Mr. Herman Phlegar, the State Department legal advisor said:

> This provision (Article XXIV, Paragraph 12, of GATT) was added because under the constitutions of some contracting parties international agreements cannot have the effect of overriding and invalidating inconsistent state legislation of their political subdivisions. It has always been interpreted as preventing the General Agreement from overriding legislation of political subdivisions of contracting parties inconsistent with the provisions of the agreement; by placing upon contracting parties the obligation to take reasonable measures to obtain observance of the agreement by such subdivisions. The parties indicated that as a matter of law the General Agreement did not override such laws.[45]

Further support for this position is found in the testimony of a State Department official to a senate committee in 1949:

> SENATOR MILLIKIN. Well, with reference to that, what can we do about it? Supposing any of our states within their proper constitutional authority put up a tax that is inconsistent with the provisions of this article which we have been discussing? What is our obligation?
>
> Mr. BROWN. I do not think we could do anything about it, Senator.
>
> SENATOR MILLIKIN. Have we promised, or held out an implied promise, to do something that we could do anything about it?
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> Mr. BROWN. I don't think so.
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> SENATOR MILLIKIN. Let us read that.

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[44] 61 Stat., pt.5, A 11, A 67, T.I.A.S. No. 1700 (1947).

[45] Letter from Herman Phleger, Department of State Legal Advisor, to Richard Sharpless, Acting Attorney General of Hawaii, Feb. 26, 1957, cited in 12 STANFORD L. REV. 355 at 373 n.3; Jackson, *supra* note 30 at 303, n.288. This letter is on file in the Department of the Attorney General of Hawaii, as contained and certified in an affidavit of April 5, 1967, by Burt T Kobayashi, Attorney General of Hawaii. It was filed by the attorneys for the plaintiff in Bethelehem Steel Corp. v. Bd. of Commissioners, *supra* note 14.

Mr. BROWN. Let me just check.
The only commitment that we have taken, on that point, Senator, is in the last paragraph of Article XXIV, page 82.

SENATOR MILLIKIN. Article XXIV of GATT?

Mr. BROWN. Article XXIV of the general agreement; yes. Because it was recognized that the Federal Government did not have the power to compel action by the local government. It only had powers of persuasion.

SENATOR MILLIKIN. Well, can we accept it as beyond "if's," "buts," "maybe's" that it is not intended that the Federal Government shall attempt to conform State Laws by any method whatsoever, to the provisions of this agreement?

Mr. BROWN. That may be taken categorically, but that does not mean that the Federal Government might not get in touch with a governor and suggest to him that he consider a course of action which the State is following has certain effects. But that would be simply a matter of persuasion and consultation.

. . . .

SENATOR MILLIKIN. Would the provisions of this article or any part of GATT impose upon the Federal Government any duties to do anything as to local State laws or movements, which are intended to promote State products, such as "Buy Georgia Peaches," "Buy Colorado Cataloups," state advertising campaigns out of public funds to promote those local buying movements?

Mr. BROWN. No, sir.

SENATOR MILLIKIN. Is there anything in this agreement any place that imposes any obligation on the Federal Government to stop anything of that sort?

Mr. BROWN. I don't think so, sir.

SENATOR MILLIKIN. Is there any question about it?

Mr. BROWN. No; I don't know of anything. It was not intended.[46]

The other interpretations of this article rest on the premise that it was designed to apply to only those nations which could not legally force their subdivisions to comply with GATT. Using this interpretation the words "reasonable measures" take on the meaning "require if legally possible." Since the United States does have the power to require its states to abide by GATT, it is obligated to do so. This reading would indicate GATT was intended to override inconsistent state legislation. Legislative history adds support to the "require if legally possible" interpretation. When, during the negotiations relating to GATT, it was suggested that Article XXIV, Paragraph 12, be deleted, a United States delegate opposed the idea stating:

> This particular paragraph was drawn from the [ITO] Charter, and I think some rather careful consideration went into its framing. I believe it is

[46] *Hearings on the Extension of Reciprocal Trade Agreements Act before The Senate Comm.*, 81st Cong., 1st Sess. pt.2 at 1161-62 (1949). It has been suggested that this witness was deliberately downgrading the scope of GATT as a result of political opposition to ITO and GATT by the members of the committee. *See* Jackson, *supra* note 30 at 308.

> necessary to distinguish between central or federal governments, which undertake these obligations in a firm way, and local authorities, which are not strictly bound, so to speak, by the provisions of the agreement, depending of course on the constitutional procedure of the country concerned.[47]

One other factor must be taken into consideration when trying to determine the meaning of Article XXIV, Paragraph 12; that is a note to Article III, Paragraph 1, found in Annex I to GATT.

> The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.[48]

Although at least one writer insists that the history of this note indicates that it was not intended to affect the language of Article XXIV, Paragraph 12,[49] on its face it appears that the interpretation of "reasonable measures" as not requiring the immediate overriding of a state law indicates that GATT was not to apply to state law.

There are plausable arguments on each side of the question whether GATT supersedes state legislation. There are only a very few cases which have addressed themselves in any degree to the problem, but they generally hold GATT to override state law.

In *Territory v. Ho*,[50] the Supreme Court of Hawaii held a statute which required sellers of foreign eggs to display identifying placards invalid because it discriminated against foreign goods, and was, therefore, inconsistent with Article III of GATT. The Court found that GATT was a treaty for supremacy clause purposes. In *Baldwin-Lima-Hamilton Corp.*

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[47] U.N. Doc. EPCT/TAC/PV/19 at 32-33 (1947). In a discussion of a similar provision in the ITO Charter a U.S. delegate noted that the provision "applied to both central and local government where the central government was traditionally or constitutionally able to control the local government." He went on to say that he thought the U.S. government would be able to control the actions of its states. (U.N. Doc. E/PC/T/C.II/27 at 1 (1946). An Australian delegate noted that when his country's "external powers laws" do not give the central government the authority to act and the matter is one solely of state action, there is no way to force the states to act. (U.N. Doc. E/PC/T/13, at 1 (1946).

[48] 62 Stat., pt.3, at 3689-3690.

[49] Jackson, *supra* note 30 at 307-308.

[50] 41 Hawaii 565 (1957).

v. Superior Court,[51] a California district court states in dicta that the California buy-American statute[52] was unenforceable because it conflicted with "certain treaties and agreements [referring to GATT, Article III, Paragraph 4] and thus the 'supreme law of the land.' "[53]

In *American Institute for Imported Steel v. County of Erie*,[54] however, the Supreme Court for Erie County, New York, upheld a buy-American resolution passed by the county legislature in connection with the construction of the Erie County Health Center facility for school children. Although the petitioner raised the subject of GATT, he did not rely heavily on the agreement in his argument and the court dismissed this contention in two sentences:

> It would appear from the foregoing provisions of GATT that they do not in and of themselves supercede local legislation. In any event, petitioners have not met their burden on this contention since it is the court's opinion that the GATT provisions are not here applicable.[55]

The *American Institute for Imported Steel* case is of little value in determining whether GATT supercedes state law because the issue was not actively litigated. The final decision of this matter will probably be in keeping with *Ho* and *Baldwin-Lima-Hamilton* and be a result not of statutory interpretation, but rather of the policy considerations to be discussed below under the section on constitutional arguments.

E. *The "Government Purchase" Exception*

Even if it is established that GATT is constitutional and superior to inconsistent state legislation, it is necessary to determine whether a specific buy-American statute, or a specific transaction under a buy-American statute can be saved by Article III, Paragraph 8(a) of Part II:

> The provisions of this article shall not apply to laws, regulations or requirements governing the procurement by government agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.[56]

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[51] 208 Cal. App.2d 803, 25 Cal. Rptr. 798 (1st Dist. 1962).

[52] CAL. GOV'T CODE § 4303 (West 1966) states:
The governing body of any political subdivision, municipal corporation, or district, and any public officer or person charged with the letting of contracts for (1) The construction, alteration, or repair of public works or (2) for the purchasing of materials for public use, shall let such contracts only to persons who agree to use or supply only such unmanufactured materials as have been produced in the United States, and only such manufactured materials as have been manufactured in the United States, substantially all from materials produced in the United States.

[53] 25 Cal. Rptr. 798 at 808.

[54] 58 Misc.2d 1059, 297 N.Y.S.2d 602 (Erie Co. 1968), *rev'd on other grounds*, 32 A.D.2d 231, 302 N.Y.S. 61 (1969).

[55] *Id.* at 1063-64, 297 N.Y.S.2d at 607.

[56] 62 Stat. pt.3, 3681.

The problems in this area center around the questions: (1) What are governmental purposes? (2) What is commercial resale? (3) What are goods? and (4) What are products for use in the production of goods?

If the term "products purchased for governmental purposes" is narrowly defined to include only items such as office equipment and construction materials for government buildings, then many of the public works projects which fall under buy-American statutes would not be included in the exception and the states would be required to treat foreign goods the same as American goods under Article III, Paragraph 4, of GATT. The fact that the federal buy-American Act[57] was not included in the Senate list of inconsistent legislation,[58] however, seems to be some evidence that a broader reading was originally intended. If "government purposes" was meant to have only a very narrow meaning, then the coverage of all public buildings and works in the federal buy-American statute would remove it from the governmental purposes exception and it would have been included in the Congressional list of inconsistent legislation.

In testimony to the Senate Finance Committee in 1947, Mr. John M. Leddy, advisor to the Division of Commercial Policy, United States Department of State, testified that the ITO provision analogous to GATT Article III, Paragraph 8(a)[59] (the governmental purposes exception) would not affect the United States buy-American Act,[60] thus giving further support for the broad interpretation position. While the use of the phrase "administrative supplies" in the ITO provisions may be argued to exclude large capital expenditures, the overall legislative history seems to require the term "governmental purposes" be broadly construed, thereby exempting state public works projects.

The questions "What is a commercial purpose?" and "What constitutes goods and products used for the production of goods?" manifest themselves in situations where there are proposed constructions of utilities or highways. Does a city's charging for water or a state's collecting a highway toll tax constitute a commercial sale? Is the water a type of goods or a treatment facility a product for use in the production of goods? In *Baldwin*,[61] a California district court held that the purchases of electrical equipment used in generating electrical power were for "use in the production of goods for sale"[62] and therefore do not fit under the govern-

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[57] *Supra* note 4.

[58] *Supra* note 41.

[59] That provision read: "The provisions of this Article shall not apply to the procurement by governmental agencies of supplies for governmental use and not for resale (nor for use in the production of goods for sale.)" *See Hearings on Trade Agreement System and Proposed International Trade Organization Charter Before the Senate Committee of Finance*, 80th Cong., 1st Sess., at 339 (1947).

[60] *Id.* at 339-340.

[61] *Supra* note 53.

[62] 25 Cal. Rptr. at 809.

mental purposes exception. The court went on to say: "Electricity is a commodity which, like other goods, can be manufactured, transported, and sold."[63]

The history of the governmental purposes exception indicates that a reading broad enough to include public works projects which fall under state buy-American statutes was originally intended. Thus, if a court wishes to keep a state buy-American statute out of the exception clause it must, as did *Baldwin*, liberally construe other words in the statute.

There were three main reasons for the original enactment of this section of GATT: (1) to allow various countries to maintain a better balance of payments, (2) for national security purposes, and (3) for the protection of local industry.[64] If a court is to decide a case on the basis of these policies, the balance of payments and protectionist rationale, and in some cases the security rationale, would dictate that state buy-American statutes should fall within the exception. It is not altogether clear, however, that our national policy is the same in regard to these matters as it was at the establishment of GATT, especially in the area of protectionism. The exception clause seems to be an area now ripe for further executive or legislative action. Until that action comes, the courts will continue to decide on a case-by-case basis in line with their individual views and prejudices.

II. STATE "BUY-AMERICAN" STATUTES AND THE CONSTITUTION

Partially, as a result of the uncertainty surrounding GATT, the two most recent cases concerning non-federal buy-American statutes were resolved on grounds other than GATT.

A. *The Foreign Affairs Power*

In *Bethlehem Steel v. Board of Commissioners*,[65] the Bethlehem Steel Corporation, which submitted bids for the construction of a California public works project based on the use of American steel, filed two suits against the Department of Water and Power of the City of Los Angeles.[66] The relief sought was (1) an injunction prohibiting the award of the contract to a bidder who did not comply with the California buy-American Act, (2) a declaration that the Department must comply with the buy-American Act in the future, and (3) damages. The trial court granted summary judgment for the defendants in a consolidation of the two suits

[63] *Id.*

[64] Kenneth W. Dam, *The GATT—Law and International Economic Organization*, University of Chicago Press, Chicago & London 1970, pp. 200-202.

[65] 276 Cal. App.2d 221, 80 Cal. Rptr. 800 (Ct. App. 1969).

[66] One suit was to enjoin the Department from performing a contract for the purchase of steel, the other was to enjoin the performance of a contract for the construction of suspension towers used for electrical transmission lines.

and the court of appeals affirmed, holding the California buy-American statute[67] unconstitutional on the basis of its interfering with the federal government's exclusive powers over foreign affairs.

In *United States v. Curtiss-Wright Export Corp.*,[68] it was established that the exclusive power of the federal government in the area of foreign relations exists neither as a result of a specific constitutional delegation of power[69] nor as a delegation of power by the individual states,[70] but rather as a "concomitant of nationality."[71] This proposition was based upon the "irrefutable postulate that though the states were several, their people in respect to foreign relations were one."[72] Thus, if there is an actual conflict between state and federal laws in the area of foreign relations, the national law will prevail.[73]

The court in *Bethlehem* did not find that the California buy-American law was preempted by a federal law and therefore invalid,[74] but found that it was invalid because it interferred with a federal power which "whether or not exercised, is exclusive in the field."[75] This proposition was partially based on language found in *Purdy v. Fitzpatrick*,[76] where the California Supreme Court stated:

> We need not await an instance of actual conflict to strike down a state law which purports to regulate a subject matter which the Congress simultaneously aims to control. The opportunity for potential conflict is too great to permit the operation of the state law.[77]

However, in *Purdy*, which dealt with the employment of aliens, a section of the California Labor Code was invalidated because it ". . . encroaches upon, and interferes with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration."[78] There an actual conflict between federal and state laws did exist.

The *Bethlehem* court was on somewhat more solid ground when it re-

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[67] CAL. GOV'T CODE §§ 4300-4305 (West 1966).

[68] 299 U.S. 304 (1936).

[69] *Id.* at 318.

[70] *Id.* at 316.

[71] *Id.* at 318.

[72] *Id.* at 317. *See also, United States v. Belmont*, 301 U.S. 324, 331 (1937) where it states: ". . .in respect of our foreign relations generally, state lines disappear."

[73] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[74] 80 Cal. Rptr. n.8 at 804:

> Our attention has been directed to the federal buy-American Act (47 Stat. 1520, as amended in 63 Stat. 1024). This Act does not appear to be in direct conflict with the California Act so as to preempt the latter. Conversely, the existence of the federal Act cannot serve as justification for state legislation since, . . .it is the sole province of the federal government to act in this sphere. . . .

[75] *Id.* at n.9.

[76] 79 Cal. Rptr. 77, 456 P.2d 64 5(1969).

[77] 79 Cal. Rptr. at 84, 456 P.2d at 652.

[78] 79 Cal. Rptr. at 82, 456 P.2d at 650.

lied on *Zschernig v. Miller*,[79] to support its holding that the possibility of conflict with a federal law is sufficient to invalidate state law. In *Zschernig* the Supreme Court struck down an Oregon statute requiring an alien heir to establish the actual existence of the right to the "benefit, use or control" of inherited property under his country's domestic law before he could take from the estate of a person dying in Oregon. A broad reading of that case leads to the conclusion that statutes having more than ". . . some incidental or indirect effect in foreign countries . . ."[80] or affect ". . . international relations in a persistant and subtle way . . ."[81] or having ". . . direct impact on foreign relations"[82] by impairing the effective exercises of foreign policy, are invalid. The California court concluded that the state buy-American statute was invalid because it did have a direct impact on foreign relations by virtue of possible retaliative protectionist measures being taken by other countries against the United States.[83]

The *Bethlehem* decision has been criticized on the ground that if followed it would invalidate statutes representing valid state interests whenever those statutes affect the vaguely defined area of foreign affairs.[84] To the extent the court maintains that a potential interference with uncertain federal powers is enough to invalidate a state law, the criticism is well-taken. However, the finding of the court that a state buy-American statute encroaches upon the ability of the federal government to carry out foreign affairs seems to validate the decision in this particular class of state legislation.[85]

B. *The Commerce Power*

The concurring opinion in *Bethlehem* by Justice Aiso suggests that the

[79] 389 U.S. 429 (1967).

[80] *Id.* at 434.

[81] *Id.* at 440.

[82] *Id.* at 441.

[83] 80 Cal. Rptr. at 805.

[84] 3 N.Y. J. INT'L L. & POL. 164 at 171-172 (1970); 6 TEX. INT'L L. FORUM 134 at 140-141 (1970).

[85] In *Bethlehem*, at 80 Cal. Rptr. 4, n.11, the court recognizes an editorial in the New York Journal of Commerce dated Oct. 15, 1964 which reads in part:

> Something of a dilemma confronts the present Administration and will also confront any future administration in consequence of the urge that prompts many State Legislatures to enact measures that restrict the flow of international commerce within their borders. . . . The nature of this delemma was suggested in a Washington dispatch to this newspaper yesterday. In brief, its message was to the effect that Washington's opportunity to win meaningful tariff concessions from foreign countries in the current Kennedy Round may be much curtailed by "Buy American" or simply "Buy Local" laws adapted in many states. . . . In the circumstances about the best we can hope is that the State Legislatures will try harder in the future to temper the urge to protect their own producers with realization that the cumulative effect of procurement restrictions among many states can produce impossible rigidities in national policy. Even those who do not approve of the national foreign trade policy should realize that if it is to be determined by the future policies of 50 different entities, there won't be any policy at all.

California buy-American statute could have been struck down by relying on the power of the federal government to regulate foreign commerce.[86] Many commentators have also suggested this approach in dealing with buy-American statutes.[87] The power of Congress to regulate foreign commerce extends to being able to ensure that no commercial barriers are raised by the states. In *Welton v. Missouri*,[88] the Supreme Court said: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin."[89]

The leading case in the area of state statutes regulating foreign commerce is *Brown v. Maryland*,[90] where the Supreme Court struck down a Maryland statute requiring importers of foreign goods to take out a license costing fifty dollars. The Court held that such a regulation obstructed the right of the federal government to control foreign commerce,[91] although it recognized that the state still possesses certain powers to regulate trade within its borders which may incidently regulate foreign trade entering the state. The Court, however, declined to decide where the powers of the state stop and those of the federal government begin because "like the intervening colours between white and black they approach so nearly as to perplex the understanding as colours perplex the vision in marking the distinction between them."[92]

Later courts have used more than one method to determine where to draw the line between the right of a state to regulate trade within its borders and the exclusive right of the federal government to control foreign commerce. In *Cooley v. Board of Wardens*,[93] the "national nature" test was announced whereby the states were prohibited from exercising their rights if the subject were such that it demanded a single uniform policy in dealing with other nations.[94] Later, in *Pennsylvania v. Nelson*,[95] the Court held that a federal regulation was supreme if (1) the regulation is so pervasive as to make reasonable the inference that Congress left no room to supplement it, (2) if the federal interest is so dominant that the

[86] 80 Cal. Rptr. at 806. U.S. CONST. art. I, § 8, cl. 3 confers upon the federal government the power "to regulate Commerce with foreign nations."

[87] Comment, *California's Buy-American Policy: Conflict with GATT and the Constitution*, 17 STANFORD L. REV. 119, 132 (1964); Note, *Constitutionality of Buy American Acts Under the Commerce and Supremacy Clauses*, 8 VA. J. INT'L L. 151, 155 (1967); N.Y. J. INT'L L. & POL. 164, 172-173 (1970); 6 TEX. INT'L L. FORUM 134, 141-142 (1970).

[88] 91 U.S. 275 (1875).

[89] *Id.* at 282.

[90] 25 U.S. (12 Wheat.) 419 (1927).

[91] *Id.* at 448.

[92] *Id.* at 441.

[93] 53 U.S. (12 How.) 299 (1885).

[94] *Id.* at 319.

[95] 350 U.S. 497 (1956).

federal system must be assumed to preclude enforcement of state laws subject, or (3) if the enforcement of the state law presents a serious danger of conflict with the administration of the federal program.[96] Later cases have held, in accordance with *Brown*, that state restrictions on foreign imports infringe on the foreign commerce power of the federal government and are therefore invalid.[97]

There would be little difficulty in finding a state buy-American statute invalid as against the commerce clause. In *American Institute for Imported Steel*,[98] however, a New York court rejected this argument:

> We must necessarily differentiate between the proprietary action of the state and its acts which purport to regulate private transactions where it [the government entity] attempts to regulate private transactions arbitrarily; this may well be a constitutional problem. However, when the state acts in its proprietary capacity there can be none.[99]

In holding that the state in its proprietary capacity can regulate its own transactions, the court relied heavily on *People v. Crane*,[100] decided in 1915, in which the New York Court of Appeals held that the state could constitutionally exclude aliens from public works projects:

> To disqualify aliens is discrimination, indeed, but not arbitrary discrimination; for the principle of the exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state.[101]

While the issue of the rights of aliens brings up many problems beyond the scope of this note, it should be pointed out that in *Purdy*,[102] the California Supreme Court held that a state may not constitutionally enact a statute prohibiting employment of aliens on public works projects. *Purdy* also held that a state has no power in an area in which Congress has shown the desire to regulate with a single national scheme. This approach appears to be the best one and the one courts will adopt in the future. The "proprietary interest" of a state should not be allowed to upset the complex scheme of the federal government in the area of foreign commerce.

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[96] *Id. See also Rice v. Cooley*, 331 U.S. 218 (1947), where the court holds that the test of applicability of a state's right to act is where the matter is *in any way* regulated by federal law.

[97] City of Columbus v. McGuire, 25 Ohio Op. 2d 331, 195 N.E.2d 916 (Franklin County Mun. Ct. 1963); City of Columbus v. Miqdadi, 25 Ohio Op. 2d 337, 195 N.E.2d 923 (Franklin County Mun. Ct. 1963).

[98] 58 Misc.2d 1059, 297 N.Y.S.2d 602 *rev'd on other grounds*, 302 N.Y.S. 60 (1969).

[99] 297 N.Y.S.2d at 609.

[100] 214 N.Y. 154, 108 N.E. 427 (1915).

[101] *Id.* at 161, 108 N.E. 427 at 429.

[102] *Supra* note 76.

III. CONCLUSION

The state buy-American statutes are the result of a protectionist attitude which was at one time dominant in the United States. Although this attitude may be returning today, it is important that import restrictions be determined on a national level through the political process. If the need arises there are even now methods the federal government can use to regulate foreign imports, including anti-dumping laws and various quota systems. Individual states, however, are neither equipped nor empowered to make this type of far-reaching decision concerning the direction of our foreign commerce. At least the commerce clause remains as one legal means for striking down buy-American provisions. State and federal courts have an obligation to use that route whenever possible to eliminate state and local legislation affecting international commerce.

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